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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL HARTNETT, Defendant and Appellant.	A096631 (Sonoma County Super. Ct. No. 23975)

Michael Hartnett appeals a judgment committing him to four years in state prison following a finding that he was in violation of probation. We affirm.

PROCEDURAL BACKGROUND

The probation order was entered following appellant's pleas of no contest in two criminal proceedings in Sonoma County Superior Court. An information filed on April 11, 1996, in case No. 23975 charged appellant with two gun-related felony counts including being a felon in possession of a firearm (Pen. Code, § 12021, subd. (a)(1)) and alleged a prior prison conviction within the meaning of Penal Code section 667.5, subdivision (b), for the crime of drunk driving with three prior convictions. (Veh. Code, § 23550.) In a separate case numbered 24127 that is not included in the appellate record, appellant was charged with several counts including threats to commit a crime resulting in death or great bodily injury. (Pen. Code, § 422.) In a hearing on February 18, 1997, appellant entered pleas of no contest to one felony count in each proceeding -- violation

of Penal Code section 12021, subdivision (a)(1), in case No. 23975 and Penal Code section 422 in case No. 24127 -- and admitted the prior prison conviction.

On March 20, 1997, the court sentenced appellant to four years in state prison but suspended execution of the sentence for a five-year period of probation. The four-year sentence was based on an upper term of three years for conviction of Penal Code section 12021, subdivision (a)(1), and one year for the prior prison term enhancement under Penal Code section 667.5, subdivision (b), and a concurrent two-year sentence for the conviction of Penal Code section 422. Among the conditions of probation were the requirements that appellant abstain from consuming alcohol and participate in a residential treatment program for alcoholism.

The record contains a lengthy history of appellant's repeated violation of probation in a series of incidents related to his chronic alcoholism which led to orders modifying his terms of probation and authorizing successive rehabilitation programs. One of these modification orders is relevant to this appeal. On January 27, 2000, appellant admitted a violation of probation and waived a hearing. The trial court then modified the terms of probation to release him to the Delancey Street residential treatment program. Upon the district attorney's request, the trial court asked appellant to waive 162 days of custody credits as a condition for his release to the Delancey Street program.

The last violation of probation, which resulted in the judgment on appeal, came up for hearing on August 4, 2001. The probation officer assigned to appellant's case, Gene Stevenson, testified that appellant had last been ordered to attend a residential treatment program of the Salvation Army. He failed to complete the program and returned to his home without notifying the probation office. On April 4, 2001, Stevenson visited appellant's home and found him to be severely intoxicated. He was arrested for a probation violation and registered a .17-blood-alcohol content in a breath test. At the conclusion of the hearing, the court found appellant in violation of probation for use of alcohol on April 4, 2001, and revoked probation.

While the sentencing hearing was pending, appellant filed a "Motion to Reinstate and Clarify Custody Credits" in which he contended that he did not make a knowing and intelligent waiver of the 162 days of custody credits at issue in the hearing on January 27, 2000. On October 12, 2001, the trial court found that appellant had voluntarily waived the 162 days of actual custody credits, and sentenced him to the previously imposed four-year sentence in state prison with custody credits of 722 days.

DISCUSSION

As his sole assignment of error, appellant maintains that the trial court erred in finding that he voluntarily waived the 162 days of actual custody credits at the hearing on January 27, 2000. "In *People* v. *Johnson* (1978) 82 Cal.App.3d 183, the court held that a defendant may validly waive custody credits pursuant to Penal Code section 2900.5. . . . [¶] Since the *Johnson* decision, it is well settled that a defendant may waive custody credits as a condition of probation, or in exchange for other sentencing considerations. [Citations.] The waiver, however, must be ' "knowing and intelligent" ' in the sense that it was made with 'awareness of its consequences.' [Citation.]" (*People v. Salazar* (1994) 29 Cal.App.4th 1550, 1553; *People v. Harris* (1987) 195 Cal.App.3d 717, 725; but see *People v. Burks* (1998) 66 Cal.App.4th 232.) "An awareness of the consequences of waiving any right should include an understanding of the impact of that waiver on the amount of time a defendant may be incarcerated. [Citations.] It follows from these principles that, before a defendant agrees to waive custody credit to which he is entitled, he should understand the full consequences of the waiver." (*People v. Ambrose* (1992) 7 Cal.App.4th 1917, 1922-1923.)

The record reveals that at the hearing on January 27, 2000, the court advised appellant as follows: "The Court: 'Probation is continued for a period of four years from today. You waive all credits -- I'm also asking you to waive all credits while you're in treatment. Do you agree to do that?' [¶] The Defendant: 'Yes, Your Honor.' [¶] Mr. Brooks [the prosecutor]: 'Your Honor, that would include a waiver of his past credits, for his credits while awaiting placement, and credits while in treatment, that will be both custodial and good time, work time credits?' [¶] The Court: 'Yes. Do you understand

that? Do you waive all those credits?' [¶] The Defendant: 'Yes, I do, Your Honor.' [¶] The Court: 'So it is clear to you when you get out of Delancey Street, there is still a four-year probation, and the entire sentence is available? You will have no credits. So if you get out of Delancey Street and there is a violation, and come back to this Court, this Court could sentence you to the full amount of the original sentence?' [¶] The Defendant: 'I understand, Your Honor. Thank you, Your Honor.' "

We think that any ambiguity that may have existed in the court's initial request "to waive all credits" was removed by the two successive clarifications. At the prosecutor's prompting, the court made clear that appellant would be waiving both custodial and work-time credits. Then, the court reviewed again the effect of the requested waiver in clear language. Appellant was told that if there was a violation after he completed the Delancey Street program, he would "have no credits" and the court could sentence him "to the full amount of the original sentence." Since the original sentence was a prison sentence, the statement could only mean that he would be waiving all credits against the prison sentence.

As a court of review, we must be guided by the adequacy of the record. We have no reason to speculate that appellant might not have understood what he was told or meant what he said in waiving the custody credits. The record discloses that the court clearly requested appellant to waive all credits against the original prison sentence as a condition for release to the Delancey Street program and appellant assented to this condition. We therefore have no basis for overturning the trial court's finding of waiver of the custody credits.

The judgment is affirmed.

Swager, J.

We concur:

Marchiano, P. J.

Margulies, J.